BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHERMAN O. YOUNG Claimant	)	
VS.	)	
WASHBURN UNIVERSITY Respondent	)	Docket No. **1,049,923**
AND	)	
HANOVER INSURANCE CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the July 14, 2010 Preliminary Hearing Order entered by Administrative Law Judge Rebecca A. Sanders.

ISSUES

The claimant had a total right knee replacement. Approximately two weeks after he returned to work he slipped going down stairs while performing his custodian job and injured his right leg. Respondent argued the accident was a natural and probable consequence of the knee replacement and consequently did not arise out of his employment.

The Administrative Law Judge (ALJ) found claimant sustained an accidental injury arising out of and in the course of his employment. The ALJ further ordered respondent to pay for medical treatment with Dr. Michael Schmidt and temporary total disability compensation beginning January 29, 2010.

Respondent requests review of whether claimant's accident is compensable. Respondent argues that claimant's accident did not arise out of his employment and instead was: (1) the natural and probable consequence of his knee replacement; (2) the result of an activity of daily living, i.e. going down stairs; and, (3) the result of a personal condition, muscle weakness due to the knee replacement surgery. Respondent requests the Board to deny the claim and reverse the ALJ's Preliminary Hearing Order.

Claimant argues that his accidental injury arose out of a risk distinctly related to going up and down the staircase 20 to 30 times a day or in the alternative from a neutral

risk arising from an unexplained fall. Claimant requests the Board to affirm the ALJ's Preliminary Hearing Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

At the time of the preliminary hearing, Mr. Young had worked approximately six years as a custodian for respondent. On September 29, 2009, claimant underwent a total right knee replacement and was off work through January 3, 2010. This was not the result of or treatment for a work-related injury. Dr. Michael Schmidt treated the claimant during this time frame and released him to full-duty work. Claimant's first full day back to work was January 4, 2010.

Claimant's job duties included cleaning the entryways and hallways as well as gathering trash in all of the offices of a four story building on respondent's campus. Claimant would empty trash cans into a wheeled barrel and when it was half full he would go to the first floor and take the trash outside for pickup. This required claimant to use a five step stairway. Claimant testified that he would go up and down this stairway from 20 to 30 times a day.

Claimant testified:

> Q. Okay. And what do you do as you accumulate trash?
>
> A. Well, I work until my barrel gets half full. Then I stop. Then I go back down the first floor. Whatever floor I'm on, I go back to the exit that I take the trash out to set it outside for the pick-up. Then I go back inside and get my barrel and go back to my area that I stopped.
>
> Q. In an average day, sir, in January of 2010, approximately how many times would you gather your trash into the bag and take it out to the place outside the building for pick-up?
>
> A. I'd say anywhere from about twenty to thirty times. That's only – you know, it depends on the day of work, what – what they're going to put out.
>
> Q. Okay. And are your required to traverse any stairs when you perform that process?
>
> A. Yes.
>
> Q. And describe the stairs for us.

> A. I've got about five steps to it, and one I walk up and use daily at work to go out and in, taking out trash and boxes, whatever needs to be set outside for the pick up.[1]

After claimant had worked an 8-hour day, he would have soreness and swelling in his right knee so he would put ice packs on it and take some pain medication.

On January 19, 2010, claimant suffered an injury and described it in the following manner:

> Q. And then what happened to injure your right knee on that day?
>
> A. Well, I was out taking out the trash and I came back in. I went to step back down to get back down on the lower level, lower – lower level to get my barrel to go back up and continue my work. And I moved my right leg on the step first and then I put my left one. Then I went on down to the second step from the top. I put my right leg on it. By the time my left leg came down to the – even with my right leg, my right leg just slid up under me.
>
> Q. Okay. When you said it slid, which way did it slid - - slide from your body?
>
> A. Down.
>
> Q. Downwards and away from your body?
>
> A. Yes.[2]

As the claimant slipped he grabbed the railing with his right hand and used his left arm to brace himself from falling completely down. Claimant had immediate pain in his right knee when his feet hit the bottom step.

Claimant contacted his supervisor by telephone to let her know that he had injured his right leg. He sought medical treatment at St. Francis Hospital's emergency room. The January 19, 2010 contemporaneous emergency report signed by Dr. Laurel A. Vogt contained, in pertinent part, the following:

> He states he was going down a flight of stairs when his right foot slid out from under him and he fell down about 3 steps, landing hard on the right leg. He did not fall to the ground.[3]

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[1] P.H. Trans. at 10-11.

[2] P.H. Trans. at 15.

[3] P.H. Trans., Cl. Ex. 1.

The nurses' notes from the initial emergency room visit likewise contain a history of a slip on the stairway.

At some time after the accident claimant provided a statement to a claims adjustor. During that recorded conversation, the claimant gave a history of how the injury occurred and he indicated that he felt like his knee had no strength and it just gave out. But at the preliminary hearing the claimant testified that he did not experience weakness in his right leg until it began to slide off the step.

The emergency room doctor took claimant off work for the rest of the day and placed him on light-duty work. Claimant was also referred back to Dr. Schmidt. On February 18, 2010, claimant was examined and evaluated by Dr. Schmidt. Ultimately, Dr. Schmidt determined there did not appear to be any injury to claimant's right knee arthroplasty. Dr. Schmidt suspected claimant had injured his quad tendon. Dr. John Gilbert, at the request of respondent, examined claimant and concluded he had suffered a right knee strain. In response to a question whether claimant's current complaints were a result of a new injury or a natural consequence that would be expected following a total knee replacement the doctor responded in the following manner:

> I believe that his injury of January 19, 2010 was a result of quadriceps weakness following right knee replacement arthroplasty, such that his knee failed while descending stairs resulting in a hyperflexion strain to the right knee. As such, it would be a consequence of his recent knee replacement exacerbated by the injury or activity of January 19, 2010.[4]

In this case, there is no question that claimant's injury occurred "in the course of" claimant's employment. He was performing his job on the respondent's premises when he fell. The dispositive issue is whether claimant's injury "arose out of" his employment when he fell on the stairway as he was taking trash outside the building.

Respondent initially argues that the act of walking down the steps was nothing more than a normal activity of daily living.

Under the Kansas Workers Compensation Act an injury does not "arise out of" employment where the disability is the result of the natural aging process or by the normal activities of day-to-day living.[5] An injury is not compensable unless it is fairly traceable to the employment and comes from a hazard which the worker would not have been equally exposed to apart from the employment.[6] But an injury arises out of employment if the

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[4] *Ibid*.

[5] K.S.A. 44-508(e).

[6] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, *rev. denied* 281 Kan. 1378 (2006)

injury is fairly traceable to the employment and comes from a hazard the worker would not have been equally exposed to apart from the employment.[7]

Although climbing and descending stairs may under certain circumstances be considered an activity of day-to-day living, nonetheless, it was the frequency that claimant was required to climb the stairs to remove trash from the building that provides a hazard that he would not have been equally exposed to apart from his employment. As in *Anderson,* the claimant's accident resulted from the concurrence of his preexisting condition in his knee and the frequency that he was required to use the stairs to place the trash outside the building. And there is nothing to indicate that claimant would have been equally exposed to such frequent stair climbing apart from his work. Moreover, Dr. Gilbert opined that claimant's complaints were a combination of his preexisting knee condition exacerbated by claimant's activity and injury on January 19, 2010. And that work activity included claimant's frequent stair climbing at work. Based upon the record compiled to date, the claimant has met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment and not as a natural consequence of his preexisting knee condition.

Respondent also argues the fall was the result of a personal condition of the claimant due to his recent total knee replacement.

In *Hensley*,[8] the Kansas Supreme Court categorized risks associated with work injuries into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the worker; and (3) neutral risks which have no particular employment or personal character. This analysis is similar to the analysis set forth in 1 *Larson's Worker's Compensation Law*, § 7.04[1][a] (2006). The simplest explanation is that if an employee falls while walking down the sidewalk or across a level factory floor for no discernable reason, the injury would not have happened if the employee had not been engaged upon an employment errand at the time.

"Only those risks falling in the first category are universally compensable; personal risks do not arise out of the employment and are not compensable."[9] However, in this instance, the fall is basically unexplained. Claimant described that his foot slipped of the stair step but agreed that there was nothing on the step that he saw that he slipped on. Claimant simply slipped on the stair step. In Kansas, unexplained falls are compensable. As noted in Larson's above, the unexplained fall becomes compensable because if an employee falls, for no discernable reason, while walking down the sidewalk or across a

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[7] *Anderson v. Scarlett Auto Interiors,* 31 Kan. App. 2d 5, 61 P.3d 81 (2002).

[8] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979); see also *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d. 5, 61 P.3d 81 (2002).

[9] *Martin v. U.S.D. 233*, 5 Kan. App. 2d 298, 299, 615 P.2d 168 (1980).

level factory floor, or even while walking down steps, the injury would not have happened if the employee had not been engaged in employment at the time. In this instance the slip was akin to an unexplained fall and is compensable.

This Board Member is mindful that claimant had just been released following a total right knee arthroplasty and his comments to the insurance adjuster that his leg gave out could provide evidence that the fall was the result of a personal condition. The transcript of the recorded conversation between the insurance adjuster and claimant was not part of the evidentiary record. Consequently, the specific question and answer as well as the exact context of claimant's response was not provided. And claimant further clarified his statement at the preliminary hearing to indicate the weakness in his leg occurred after he slipped. However, the more persuasive evidence was the contemporaneous history provided at the emergency room. Claimant consistently gave a contemporaneous history of slipping on the stair step and there was no mention of his leg giving out.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[11]

WHEREFORE, it is the finding of this Board Member that the Preliminary Hearing Order of Administrative Law Judge Rebecca A. Sanders dated July 14, 2010, is affirmed.

IT IS SO ORDERED.

Dated this 29th day of October 2010.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Darin M. Conklin, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge

[10] K.S.A. 44-534a.

[11] K.S.A. 2009 Supp. 44-555c(k).